EXHIBIT A

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY

IN RE:	.	Case No. 19-13273-VFP
	.	Jointly Administered
IMMUNE PHARMACEUTICALS, INC. and BARUCH HAKIM ("Israeli Trustee"),	.	M.L.K. Federal Building
	.	50 Walnut Street, 3rd Floor
	.	Newark, NJ 07102
Debtors.	.	
	.	
IMMUNE PHARMACEUTICALS, INC., ET AL,	.	Adversary No. 19-02033-VFP
	.	
Plaintiffs,	.	
	.	
vs.	.	
	.	
DISCOVER GROWTH FUND, LLC,	.	
	.	June 23, 2020
Defendant.	.	11:44 a.m.

TRANSCRIPT OF MOTION TO SUBSTITUTE THE TRUSTEE FOR DEBTORS AND COMMITTEE COUNSEL, MOTION TO EXPUNGE THE CLAIM OF FIDELITY VENTURE CAPITAL, MOTION TO RECONSIDER ORDER DENYING SUMMARY JUDGMENT, AND MOTION FOR RELIEF FROM STAY

BEFORE HONORABLE VINCENT F. PAPALIA
UNITED STATES BANKRUPTCY COURT JUDGE

TELEPHONIC APPEARANCES:

For Discover Growth Fund:	Gibbons, P.C. BY: DALE BARNEY, ESQ. One Gateway Center Newark, NJ 07102
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Proceedings recorded by electronic sound recording, transcript produced by transcription service.

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THE COURT: All right. Let's see. Immune Pharmaceuticals, Inc., et al., versus Discover Growth Fund, LLC, 19-2033, in case number 19-13273. There are several matters on.

One is the motion to substitute the trustee for debtors and committee counsel. There is a motion to expunge the claim of Fidelity Venture Capital. And there is a motion to reconsider the Court's order denying summary judgment on the 510(b) claim. And there is a motion for relief from stay.

Can I get appearances and a suggested order, please?

MR. RABINOWITZ: Good morning, Your Honor. John Rabinowitz of Rabinowitz Lubetkin & Tully on behalf of the Chapter 7 Trustee, Jeffrey Lester.

Your Honor, I would suggest that the Fidelity motion be taken first, then the substitution, then reconsideration, and then stay relief, in that order.

Fidelity, I think, has been resolved. The substitution issue is fairly discrete. Reconsideration is a significant motion, and the stay relief motion is a significant motion as well.

THE COURT: Yeah. Okay.

MR. BARNEY: Your Honor, Dale Barney, good morning, Gibbons, on behalf of Discover Growth Fund.

I'm fine with the order that Mr. Rabinowitz suggested.

THE COURT: Yeah. Actually, that makes sense to me, too. So why don't we -- why don't we just take them in that order, and let's get going.

MR. RABINOWITZ: Your Honor, then, if I might, John Rabinowitz, on behalf of the trustee. With regard to the Fidelity motion, this is a motion that was filed by the Committee shortly before conversion, objecting to the claim of approximately $15 million that Fidelity filed against Immune, Inc., here in the United States proceedings, and the cases were then converted.

The trustee has taken over the Committee's motions, objected to the claim, and filed a reply last week. And it appears, based upon that reply, that Fidelity is withdrawing its claim.

A pleading was served on me. I assume it was filed with the Court as well. And Fidelity is saying, based upon an expected small or no distribution here, they were withdrawing the claim and preserving their rights against Immune Pharmaceuticals, Ltd., in the Israeli bankruptcy proceeding.

Just to give Your Honor a little flavor here, the Committee's motion was based upon absence of contractual privity, arguing that Fidelity's claim was against Ltd., the Ltd. entity, and they only had a surviving claim in the United States against the Inc. entity, and then alternatively argued that if they had a claim against Inc., that it should be

subordinated, it was a damage claim arising from a securities purchase agreement and should be subordinated under Section 510(b).

The trustee added to those grounds in his reply. In the interim, the claim administrator in Israel issued an opinion disallowing Fidelity's claim against Ltd. And the grounds for that disallowance were that they hadn't satisfied the conditions of the contract between the parties. Secondly, there was no new or subsequent contract. And, thirdly, any claim for damages was impermissible interest.

In addition, the trustee here argues that that rationale applies equally as well to any claim that Fidelity asserts against Inc., and that the merger didn't create any further liability.

So, the trustee does not object to Fidelity's withdrawal of the claim. The only issue that I would raise, Your Honor, is Bankruptcy Rule 3006 requires court action upon withdrawal of a claim when an objection has been filed.

So, if Your Honor is satisfied that Fidelity is withdrawing its claim, the trustee requests that Your Honor enter an order to that effect or approve the withdrawal because of the requirements of Bankruptcy Rule 3006, since an objection to plan has been filed.

THE COURT: Okay. Just one -- one clarification point, Mr. Rabinowitz. Fidelity is withdrawing its claim

against Inc. and Ltd. in the U.S. or just Inc.?

MR. RABINOWITZ: Well, it had -- it's a good question, Your Honor.

Prior to conversion, Fidelity filed two claims in the United States, one against Inc., and one against Ltd.

THE COURT: Right.

MR. RABINOWITZ: Previously, they filed a letter on the docket indicating that their claim against Ltd. had been withdrawn.

So it is the position of the Chapter 7 Trustee that the only remaining claim in the United States proceedings is the claim against Inc. I was not involved in the case when that letter withdrawing the Ltd. claim was submitted. I don't know if the Court took any action with regard to it. But it would be the trustee's position that they withdrew the prior claim against Ltd.

And I believe that's what -- Fidelity perceives that they previously withdrew the claim against Ltd., and doesn't see a need to take further action to effect that.

It's my understanding that the reason that Fidelity withdrew its claim against Ltd. was to avoid an argument that there has been -- that jurisdiction of the Israeli bankruptcy proceeding had been divested with regards to its claims against Ltd., because it has continued to prosecute its claim in the Israeli Ltd. bankruptcy proceeding.

So my view would be that the only claim that remains is Inc., and that is what they are withdrawing.

THE COURT: So, two things. One is why don't you submit an order on notice to Fidelity's counsel in Israel that the Court is accepting the withdrawal of both claims against Inc. and Limited in the United States with prejudice, because I agree that Fidelity has no claim at all on the merits under subordination for the reasons that were stated in Israel, for the reasons that were stated when they objected to the proposed sale.

I have no problem -- I would have had no problem disallowing their claim, but I have no problem allowing withdrawal and to confirm that it's against both Inc. and Limited. So, we can do that.

And then, the second thing I wanted to just ask, you know, I should remember this, but I don't remember it exactly, I entered an order on the protocol that allows them to continue in Israel, which I guess they're appealing, right, so that all remains in place with Fidelity.

MR. RABINOWITZ: Yes, Your Honor, but just an updated, if I might, without belaboring the record, Your Honor approved the claims protocol motion. Your Honor had comments, and I modified the order consistent with Your Honor's comments on the record and circulated it to all parties in interest. I have received some feedback from the Israeli receiver, and I am

in the process of resolving his concerns so that I can submit an order. So Your Honor hasn't actually had an order to enter yet on the claims protocol.

THE COURT: Oh, that was a gap in my memory.

MR. RABINOWITZ: Yeah, because I have to try -- I'm working it out with the Israeli receiver.

The issue that is being worked out is Your Honor was rightfully concerned that creditors here in the United States had taken steps to file claims here in the United States. In addition, the debtor has listed certain creditors as neither contingent disputed or unliquidated on the schedules, and Your Honor wanted the United States Trustee to present those timely filed claims and the claims that were not listed as C, U, and D, to the Israeli receiver, thereby obviating the needs of those creditors to refile or take new steps in Israel.

And so it was a very good suggestion. It's just taken a little time to coordinate with the Israeli trustee his acceptance of that procedure. We will get there, but that's what has delayed the submission of the order.

THE COURT: Okay. So you'll submit an order on notice to the Israeli parties as well?

MR. RABINOWITZ: I will do that, Your Honor.

THE COURT: Fidelity and I guess the receiver?

MR. RABINOWITZ: Fidelity -- yes.

THE COURT: All right. So that's done.

Then we -- what did we say in order, the substitution motion, right?

MR. RABINOWITZ: The substitution next, Your Honor.

THE COURT: Right. And, you know, I mean, I looked at it. I don't think I need to decide the issue right now to say that you are substituted in. But, to me, you are substituted in -- this is a bit of an advisory opinion, but if you're substituted in, you're substituted in. You don't get to take bits and pieces of what you substituted in for. You take the whole thing.

But, you know, if and when -- I don't need to address it now, because we need to get to a place where the offer of judgment becomes an issue. But I don't need to address it now, but that's the way I'm leaning.

MR. RABINOWITZ: And, Your Honor, I understand Your Honor's position. Your Honor did so indicate at the last hearing we had that that was Your Honor's thinking.

I do agree with Your Honor that it is not necessary to make a ruling on that issue today. I think the trustee meets the criteria for substitution under B.R. 7025 and F.R.C.P. 25(c), where the real party -- where the trustee is the real party in interest. There are a number of statutory provisions under the Code that indicate that.

And both Mr. Barney and myself can preserve whatever rights we have with regard to the effect of the offer of the

judgment. If Mr. Barney is right and the offer of the judgment becomes a significant issue at some point in the adversary proceeding, Your Honor will make that determination. I don't think it's necessary to rule at this point in time. I am mindful of Your Honor's comments.

MR. BARNEY: Your Honor, may I be heard on that?

THE COURT: Yes. Sure.

MR. BARNEY: Your Honor, Dale Barney again for Discover.

Your Honor, you're going to enter an order presumably substituting the trustee in as plaintiff in the adversary proceeding. So, while it may not be necessary to rule on the offer of judgment issue at this point, I don't see why you wouldn't, frankly, because it just makes clear that the substitution is conditional on being bound by the offer of judgment.

And, as Your Honor correctly observes, when you substitute in as a plaintiff, you take -- you step into the shoes of the prior plaintiffs and whatever baggage that comes with.

So, rather than -- I don't see any reason, frankly, to not enter the order that we submitted. That way the issue is clear, and it's a record, and there's not -- if it's meaningful later, it's meaningful later. If it's not, it's not. But I don't see a reason to delay that determination,

frankly.

THE COURT: Well, I really disagree with you, because it's not conditional. Why is it conditional? It's not conditional. It is what it is. It's -- they step into the shoes. Like, for example, if I granted a summary judgment motion, they don't get to say, "I don't want the summary judgment motion because I didn't like it." Or maybe you could move for reconsideration.

But, you know, I think it comes with the -- it just goes with being substituted. But --

MR. BARNEY: Okay.

THE COURT: -- A, we may not be -- it's just not ripe now. I'm not going to say what -- you know, what particular things the substitution is conditioned on, it's substituted as the Plaintiff in all respects, and whatever that means, that means.

MR. BARNEY: Thank you.

THE COURT: All right. I've told you what I think. Okay.

MR. BARNEY: That's fine. I'm happy to rely on that record, Your Honor.

THE COURT: Okay. All right. So I'm just going to allow the substitution, and that's it.

So that brings us to reconsideration.

MR. RABINOWITZ: Your Honor, yes. And, Your Honor, I

recognize specifically this context --

THE COURT: I'm sorry, Mr. Rabinowitz, you're coming in and out, and I'm not hearing you at all right now. Hello?

MR. BARNEY: I'm still here, Your Honor.

THE COURT: Hello?

MR. BARNEY: Judge, this is Dale Barney. Can you hear me?

THE COURT: Yeah, I hear you, Dale.

Mr. Rabinowitz?

MR. BARNEY: I can't hear John, either.

MR. RABINOWITZ: Hello.

MR. BARNEY: Oh, there he is. He's back.

MR. RABINOWITZ: Okay. I don't know what happened. I did not disconnect. For some reason the service --

THE COURT: It is breaking up quite a bit, and you just broke up again. Hello?

MR. RABINOWITZ: Your Honor, if I can disconnect and re-dial in, to see if that solves the problem?

THE COURT: Yeah. All right. Go ahead.

MR. BARNEY: I think we had this same issue at one of our prior hearings, Your Honor.

THE COURT: Yeah. I don't know what the issue is, what it relates to, but he was just getting to the good part.

MR. RABINOWITZ: Can you not hear me now?

THE COURT: I can, but even then, the words chopped

up a little bit. But let's give it a try.

MR. RABINOWITZ: All right. Well, I'm going to take the speaker and put it on handheld mode. Can you hear me?

THE COURT: Yes.

MR. RABINOWITZ: Okay. So, Your Honor, I was starting to say that I recognize, that especially in these circumstances, there is a --

THE COURT: Mr. Rabinowitz, you know what, I've got to ask you, maybe you have to pick up the phone. Is that -- because it's just not --

MR. RABINOWITZ: I've done -- I've done that.

THE COURT: Oh.

MR. BARNEY: I think, John, what you might have to do is log out of Court Solutions on your computer and hang up the phone and then reenter your credentials and call in again.

MR. RABINOWITZ: I'm logging out and calling in.

THE COURT: Oh, I thought that's what you were doing. I'm sorry. Yeah. I think we're at that point.

MR. BARNEY: There he goes.

THE COURT: All right.

(Pause)

MR. RABINOWITZ: Good morning, Your Honor.

THE COURT: All right. That sounds much more clear.

MR. RABINOWITZ: Okay. I'm on a landline.

THE COURT: Oh, that might be it, too.

MR. RABINOWITZ: Sorry about that.

THE COURT: That's okay.

MR. RABINOWITZ: So, Judge, where I was was indicating that I recognize that there is a high burden here on a motion for reconsideration when asking a trial court to essentially change its mind.

But if Your Honor will indulge me for a few minutes, I think there are compelling reasons to do so.

So Your Honor is aware that prior to conversion, the Committee and the debtors filed an adversary proceeding against Discover seeking to -- various relief, but basically seeking to subordinate their claim and lien on various theories.

And there were two motions for summary judgment, partial summary judgment, one on 510(a), which Your Honor denied, and one on 510(b), which Your Honor denied. And it is that second motion for partial summary judgment, not the first, that the trustee seeks to have Your Honor reconsider.

The motion is made under Bankruptcy Rule 9023, which incorporates F.R.C.P. 59, and this denial of partial summary judgment is an interlocutory order, and Your Honor has the power to modify an interlocutory order anytime up until the entry of final judgment. There is no prejudice to Discover, because there's no reliance.

We think the standard under the case law that we have cited is that reconsideration should be consonant with justice

or, alternatively, there is clear error, especially in light of the Supreme Court's recent ruling in Bostock where it confirmed its plain meaning rule of statutory construction.

With regard to the substance of the argument, it turns primarily on a plain meaning rule of construction, both with regard to the applicable statutory provisions and with regard to the terms of the contract.

The trustee submits that a convertible debenture is a security under 510(b) for purposes of 510(b) and cites law, particularly the Enron case, where the Court said that in determining what is a security for purposes of 510(b), we look to the terms and definitions contained in the bankruptcy court.

And the Court actually said, and I quote, that the issue can be simply framed as whether a stock option constitutes a security of the debtor, and to this question, the Bankruptcy Code provides an immediate answer. Section 101(49)(A)(xv) defines security as including a warrant or a right to subscribe to or purchase or sell a security, and as section 101(49)(A)(ii) makes plain, a stock is a security.

Therefore, the Bankruptcy Code is clear that a stock option is a security as that term is used in Section 510(b).

And so what Enron -- the proposition that Enron stands for is -- and it's not the only court. Many courts, essentially all courts that have addressed the issue, look to the Bankruptcy Code to determine what is a security for

purposes of 510(b). And here we have a definition in Section 101(49)(A)(v) that defines a security to include a debenture.

THE COURT: Well, every -- so every debenture and every note is subject to subordination under 510(b)?

MR. RABINOWITZ: I am not saying that, Your Honor.

THE COURT: Well, I think you are. And that's what we've got -- that's what we went through last time is that every convertible -- every time it says -- and this one says, "Senior secured convertible debenture" is automatically, no discussion, subordinated under 510(b).

MR. RABINOWITZ: Well, I have a response to that, Your Honor. And the rules in our court do not provide for a surreply. I thought about this at length at the end of last week as to whether to file a surreply or not.

But on Monday of last week, the Supreme Court, the United States Supreme Court came down with a decision under the Civil Rights Act that relied on rules of statutory construction in determining what a particular term meant under the Civil Rights Act.

And in that case, Bostock, this is what the Supreme Court said, "When Congress chooses not to include any exceptions to a broad rule, courts apply the broad rule." And that is a rule of statutory construction that has been confirmed by the Supreme Court.

So here we have a rule, a definition, for which

Congress has not provided any exceptions, and courts are charged with applying what that broad rule says. The plain meaning of the statute, the clear and unambiguous meaning of that statute, is that a debenture is a security. And the Court --

THE COURT: So is a note. So is a note.

MR. RABINOWITZ: But that's not consistent with the second rule of statutory construction that I just cited to, that Congress created a rule, a broad rule, for which it did not apply any exceptions.

The fact that there may be or one could conceptualize an exception to that broad rule doesn't mean that courts are able to ignore the broad rule. The broad rule here is that a debenture is defined as a security. And that's the plain and unambiguous meaning of the statute.

Now, I've got alternate arguments, but I think applying those two rules of statutory construction, one is the plain and unambiguous meaning of the statute, which says that we don't look to extrinsic material to determine what it means, and the fact that Congress did not define any statutory exceptions to that definition, requires the Court to apply the broad rule as to what the definition of a debenture is.

But that's not --

THE COURT: So the answer to my question is yes?

MR. RABINOWITZ: But it doesn't matter -- it doesn't

matter that Your Honor may say that I don't think a note is a security for these purposes. We have a broad rule here that says a debenture is a security.

THE COURT: Well, that's what I'm saying. So the argument that is being made to me again this time, just like it was made last time, is that because debenture is defined as a security under 101(49), it is automatically subordinated, whether it's converted or not, under 510(b)?

MR. RABINOWITZ: That is one of the arguments that I am making.

THE COURT: And you know what, Mr. Rabinowitz, you know I have tremendous respect for you. You're a fine lawyer. And I think, by the way, parenthetically, I think Mr. Barney's description of your brief was right on target. It was the same arguments, without the histrionics.

So that's a compliment in one sense, and it's telling you another thing in another sense, because I don't know what the different arguments are at this point. I just -- I don't have it. They said 258 times the word "investor" was repeated. You said 258 times it was repeated. They said you have to look at the plain meaning, and debenture is a security under 101(49), and, therefore, it's automatically subordinated. And you're saying the same thing.

MR. RABINOWITZ: I'm saying more than that. Your Honor may or may not be correct that the arguments repeat

arguments that were made by the debtors and the Committee. But I'm not relying solely on the plain meaning, although I think that is a persuasive argument, because Your Honor said two things in a very extended oral argument with a lot of give and take, but I believe Your Honor said two things, as I read that transcript.

The first thing Your Honor said was that I don't agree with the NAL case -- and NAL does not bind me, because it's outside the jurisdiction. I don't agree with the NAL case that a convertible debenture per se is a security for 510(b). That's what NAL says in dicta. And Your Honor said, "I don't agree with that. I'm not bound by that."

THE COURT: I said it was dicta, and I don't agree with it, because it makes no sense.

MR. RABINOWITZ: Right. So that's the first thing Your Honor said.

And the second thing Your Honor said is that Your Honor found a disputed issue of material fact, which would be the standard for denying partial summary judgment, because there was essentially extrinsic evidence or parol evidence that the parties may have intended this instrument, for lack of a better term, to be a debt instrument and not a security.

Those are the two things that Your Honor held. And with regard to the second -- and I think I am presenting this argument with a slightly, at a minimum, different approach.

With regard to the second, the trustee suggests that Your Honor shouldn't consider what the parties said to each other with regard to that, because there is nothing that is not clear and unambiguous on the face of the statute -- and I'm going to get to the face of the agreement in a minute -- as to what this term means. And it's only if there were some ambiguity should Your Honor then take the opportunity to consider what the parties' intent was.

And that's a longstanding rule of statutory construction, again, confirmed by the Supreme Court in the Bostock case. So with regard to that, the plain meaning simply says this is what the statute says, and you don't consider extrinsic stuff.

And I'll take it a step further. This is an argument that was not raised by the debtors or the Committee, that the security purchase agreement has a merger integration clause.

THE COURT: It was raised. It was raised in spades. Every argument was raised. But it doesn't matter, because what I'm saying to you is that there -- and, you know, just like there's the NAL case, there's other cases, the Mobile case -- and what was the other one in Delaware -- you know, that go the other way. And also, you know, the plain meaning, you know, about five appellate courts have said there is no plain meaning in this statute. It's difficult to understand.

MR. RABINOWITZ: Well, Your Honor, that's not what

those courts say.

THE COURT: Oh, Telegroup -- Telegroup says we have to go legislative history, we have to go to this, we have to go to that, because it's a tough call.

MR. RABINOWITZ: Yes, but not as to both elements of the cause of action. The cause of action contains two elements, what is a security, is it a security, and does the damage claim arise from a breach of the securities purchase agreement.

So the term "arises from" is where the courts have said that there is ambiguity that requires some construction. I don't deny that. The courts are clear that the term "arises from" requires some interpretation and construction. And we can go to legislative -- and it's ambiguous, and we can go to legislative history.

But I don't remember seeing a case that says that the term "security" has the same ambiguity requiring that construction. So there is a distinction.

THE COURT: But what about Mobile case, where it says you can't have every note become a security?

MR. RABINOWITZ: Okay. Your Honor --

THE COURT: What about that? It doesn't count?

MR. RABINOWITZ: It does count, but that's a note. And here we're talking about a debenture. And just because Congress didn't say there is an exception -- Congress could

have said that 510(b) only applies to an equity security. The statute doesn't say that.

I mean, I can make an argument. I'm not putting that argument before the Court today. I can make the argument that a bond, other instruments that have higher degree of debt indicia associated with them, are still subject to 510(b), but I'm not doing that.

But the Congress could have said, and it didn't -- it created a broad rule. It could have said only equity securities are subject to 510(b), but it didn't. It used the term "security." And you're not being -- Your Honor is not being asked to rule as to whether a note is a security for these purposes, but a convertible debenture which entitles the holder of that convertible debenture to get equity at some point, bargain for the right -- and again, I'm getting to a later argument -- but bargaining for the right to get it, to get the equity at some point in the future. And, in fact, there was a partial exercise in this case of a small one, admittedly, a very small one in the -- but they bargained for it, they got the right, and they exercised a portion of that right, which makes this different than a note.

So, Your Honor, I understand the example of a note, but that's not --

THE COURT: You know, bond is in 101(49) as well.

MR. RABINOWITZ: Say that again.

THE COURT: Bond -- bond is in 101(49) as well.

MR. RABINOWITZ: I understand that. But, again, Your Honor is not being asked to rule as to whether a bond is a security under 510(b) or a note is a security.

Your Honor simply has a broad rule, with no statutory exceptions, that is clear on its face, and you're being asked to rule with regard to a convertible debenture.

So, again, I go back to that second rule of statutory construction that I -- that I raised. So the -- if I can just -- I recognize that I started this argument, Your Honor, that there are difficulties in terms of overcoming a hurdle here, but I think with due consideration, these arguments have merit.

The securities law argument was raised. An alternative argument, but basically the federal securities law creates a multi-part test, and I think without going through all the elements, that this security satisfies each of the elements of that test, but --

THE COURT: But how does it satisfy each of the elements of that test? This is a one-time transaction. It wasn't publicly traded. It was between two parties, and that's it. What does the investing public know or care about this? Other than that they were advised -- other than the investing public was immediately advised of the debenture and its characteristics. And if you go to that article by those two fellows who are -- who are, I guess, credited with developing

this theory, A, they talk about purchase and sale, you know, right at the time, right at -- they're talking about it right at the beginning, and they're talking about -- they're talking about, like, traditional securities law claims.

MR. RABINOWITZ: Well, actually, the article does mention in one sentence a reference to bonds, although they don't carry forward with it.

But the article -- the article creates a principle, if we're going to get to legislative history, which was based upon this article, that says that if you bargain for any kind of upside beyond the return that a normal creditor would receive, that you assume a greater risk on the downside. That's the principle here.

And this debenture has that feature. It could have been a straight debenture. I don't want to -- and I would argue under the plain meaning in the definitional section that 510(b) would apply, but here, it's more. It's a convertible debenture, and they bargained for the right to get -- convert their entire investment into equity. It didn't turn out that way, but they bargained for that right. They bargained for that potential upside. In accordance with the Slain and Kripke article, they should assume more of the risk on the downside.

Now, Your Honor may say -- and I'm taking this piecemeal -- but Your Honor may say, but they didn't do it. They didn't exercise it. There was a partial -- small, partial

exercise, recognize that it was small.

There are cases that say that you don't have to exercise the right, you don't have to have received the equity as of the petition date in order for the 510 principle of subordination to apply.

Enron is one of them. These were employee stock options that were never exercised.

THE COURT: That -- doesn't that -- that stopped me right away with Enron. Employee stock options.

MR. RABINOWITZ: Right.

THE COURT: Okay. I have no trouble with that. That's kind of an easy one. Employee stock options. It's options to purchase stock. That sounds like --

MR. RABINOWITZ: Which were part of an employment compensation package. These were not traditional traded securities. They weren't even assignable. So if we're going to analogize to typical equity security investments that trade, employee stock options were not them. They weren't tradeable, they weren't assignable, and they were not done as an investment. Think about it. They weren't purchased by the employees --

THE COURT: That's not what they said.

MR. RABINOWITZ: They were issued as employee compensation.

THE COURT: I know, but that's not the way -- as

incentives, and to get the upside, that's what I read in that case.

MR. RABINOWITZ: Well, the upside comes from the exercise of the options to get equity. And here, the convertible feature allows the holder of the debenture to exercise to get the upside of that -- of that equity.

So, I mean, I don't want to belabor the elements of Reeves (phonetic), but when Your Honor says, "What were the expectations of the trading public with regard to this particular security?" I'm not sure that's the element of the test in Reeves. It says, "What were the expectations of the trading public with this category of securities?" It didn't have to say this particular security, what were the expectations?

THE COURT: And in this particular case, right, assuming that this public information is read by anyone, and going back to the article, in this particular case, we have a disclosure of a senior secured convertible debenture that is secured by all the debtor's assets, although they might have some problem with that, and the investing public gets that, so even that other element about, you know, extending credit on the belief that there is equity, well, how does that come into play? They have extended credit -- if anybody -- I don't know that anybody extended any credit after that anyway, because this was a company in dire straits financially, but even if

they did, they were on notice by UCCs, but 8K's, by all kinds of things that there was a senior secured indebtedness out there.

MR. RABINOWITZ: I think, if I understand correctly, what Your Honor is suggesting is that there were debt indicia associated with this transaction that in some way disqualified this instrument as a security for purposes of 510(b).

THE COURT: You know what, I'm not really saying that, because I'm going back to the -- to the two offers and everything. But I want to say, I didn't find that this is not a security. I didn't find that at all.

I found that -- I found that it might be, and it might not be for purposes of 510. That's what I found. I found there were issues of fact, and I feel like I really need to emphasize that, because the principles of the debtor said it's debt until it's converted, twice.

Mr. Kirkland said, "I am not doing another equity transaction this time," and he changed the preferred to this debenture instrument with the conversion feature.

Are there factors that cut both ways? I think so. I really do. I think so.

MR. RABINOWITZ: Your Honor put great emphasis on what the parties said to each other. So let me just suggest a hypothetical for a moment. Let's assume that the parties write up an agreement that clearly and unequivocally describes this

instrument as an equity security for purposes of 510(b). And then as between the two of them, they say, with a wink and a nod, this is not a 510(b) equity security, it's something else. That's what we consider it.

I'm suggesting to Your Honor that given the rules of statutory construction that have been the trend in the past 20 to 30 years in our judicial system, that the plain and unambiguous meaning of a statute and the plain and unambiguous meaning of a contractual provision are going to bind the parties. And unless there is some ambiguity on the face of either the statute or the contractual provision, we don't get to what the parties said to each other. You can't draft something up, call it something, and then say it's something else.

THE COURT: Oh, you better watch out there. You're hurting your investor argument.

MR. RABINOWITZ: Okay. Tell me -- I don't think so.

THE COURT: That's the exact -- that's the exact thing in a way, you know. You're saying just because you call it an investor, that means it's an investor, but really, it's something else.

MR. RABINOWITZ: All I'm saying is that because it is not ambiguous on its face, you don't look to what the people may have said. I'm not suggesting that in this particular instance there was an acknowledgment or an admission that is

admissible independently. I'm saying you don't look to it.

They sat down and they negotiated a document, and the document said what it said. It defines it as a security. It has a conversion feature which allows them to get equity. And that is what Your Honor should be looking to to make the determination as well as the clear, plain, and unambiguous face of the statute.

But I wanted to get back to the debt indicia for a moment. In BetaCom, there were promissory notes involved. In TriStar, it dealt with the conversion -- the failure to honor a repurchase agreement for a membership interest, resulted in a damage judgment for that.

The courts both said, even though those things look and smell like debt, the fact that there are debt indicia, i.e., here a security interest and maybe some repayment obligation if, in fact, the convertible feature is not exercised, those don't disqualify the instrument from being deemed a security for purposes of 510(b).

Let me just see, Your Honor. We've jumped around a little bit.

THE COURT: That's the way I do it, because, Mr. Rabinowitz, I have to tell you, I really thought about this, and I considered it very carefully the first time around. I'm considering it very carefully this time around. I don't care what standard you go by. And I just -- I just can't overlook

that, you know, the vast majority of this was never converted, that there are cases that go in every direction on this, that the Third Circuit said that, you know, contrary, I think, to what you're saying, that the "arising from" language is very ambiguous, and you need to look at legislative history. And they could have gone either way on the TeleGroup case.

I just -- I think this is an issue that I need to see what Mr. Fiorino says. I need to see what Mr. Rabin's deposition testimony was. I need to see what Mr. Kirkland says when he gets on the stand. Because, as I said, there's things that go both ways.

I just -- I didn't decide that this can be subordinated or can't be subordinated -- or is being subordinated or is not being subordinated. I've said that I need to get a better record on this because I think there are factual issues as to what the transaction was and was intended to be and whether -- and things like the two prior transactions that were straight equity deals and this one wasn't.

The fact that there was a -- there is security. Which case has security? Out of all those cases that you cited to me, which one has a security interest?

MR. RABINOWITZ: I don't think I have identified a case that talks about a security interest.

THE COURT: No, because there aren't any, because there aren't any.

MR. RABINOWITZ: But that is a debt indicia. And the general principle, the debt indicia does not disqualify the instrument for treatment under 510(b) is both in BetaCom and Tristar. But, yes, I did not find a case that talks about a security interest.

THE COURT: I agree. I agree. But I'm saying I can't decide it on a summary judgment motion. That's what I'm saying. I said it before, and I'm saying it again. I'm not comfortable --

MR. RABINOWITZ: Understood, Your Honor.

THE COURT: I'm not comfortable deciding it on a summary judgment motion when the debtor's principals said what they said. And you make great arguments. I said this to Mr. Mairo, and I'm saying it to you. You make great arguments. I think they're very good arguments.

You may win this case. I don't know. But I need to hear from the parties. I don't think I'm in a position -- in giving oral inferences, one of the things that you said, a fair inference from this is that it's a -- that it's intended as a security. Well, I have to give the inferences the other way.

MR. RABINOWITZ: Judge, let me just say three remaining things that I have. First, my arguments in the motion in no way should be construed by Your Honor to suggest that I don't believe that Your Honor gave fair and thorough and comprehensive thought and analysis. I'm not suggesting that,

because that's not the purpose of the motion.

I do want to just -- although I don't think this was a large issue, at least for purposes of any record that may be created here, the Telegroup case does define a very broad but for quasality in construing the term "arises from." And to the extent that this convertible debenture is a security, I don't think there is any dispute that under the Third Circuit's "but for" standard that the damage claim arises from the breach of a security purchase agreement, assuming this is a security.

And the last thing, Judge, I am smart enough to know, as I started this presentation, that this is a difficult burden to satisfy or a high hurdle, and from the tenor of the argument, I expect that Your Honor is likely to deny the motion for reconsideration.

At least on the issue of whether as a matter of law, as a matter of law, a convertible debenture is a security for purposes of 510(b) I believe is a case of first impression in the Third Circuit. There is nothing in the Third Circuit addressing that particular issue.

And for purposes of moving this litigation forward to a logical and expeditious conclusion, I would ask Your Honor to make reference to Bankruptcy Rule 8006. And as Your Honor is aware, 8006 creates a procedure that allows a certification for a direct appeal to the circuit. It can be done in three different ways. One of them is by consent of the parties. I

don't know that Discover and the trustee are going to be able to reach consent. It's possible. And maybe Mr. Barney's client wants this resolved as quickly as possible and would be interested in consenting to a certification.

It can be done on motion, which the trustee, assuming that Your Honor denies the motion for reconsideration, is contemplating. Or it can be done sua sponte by Your Honor. And I would ask Your Honor to give some consideration, if Your Honor is inclined, to deny the motion for reconsideration for a certification for a direct appeal to the circuit, because the legal issue of whether this convertible debenture is an equity security -- is a security under 510(b) is one of first impression in the Third Circuit.

So that's everything I have to say.

THE COURT: Okay.

MR. RABINOWITZ: And Your Honor has indulged me and given me a full and fair opportunity to say my piece.

THE COURT: I appreciate it. Thank you. And, like I said, they are very good arguments, you know, except that that's the first I'm hearing of the 8006. I've got enough on my plate for today. I'm not ready to deal with 8006 today.

Okay. All right. Mr. Barney do you want to respond?

MR. BARNEY: Well, Your Honor, I think I said the last time, after you got done with Mr. Mairo, that Frank Vecchione told me a long time ago that when you think you're

ahead, don't say too much.

I think Your Honor properly proceeds again with the nature of the transaction. I know you've said that you're certainly not ruling in Discover's favor, and I understand that, and that there are issues on both sides. I understand that.

But, you know, it certainly -- with respect to some of Mr. Rabinowitz's arguments regarding the unambiguous nature of the loan documents, or the debt documents as we called them, his view of unambiguous ambiguity -- or lack of ambiguity, I should say, is that you ignore the five-page security agreement and the fact that we have a UCC on file and the fact that we have an intellectual property security agreement and all the indicia of debt. I know he walked that back a little bit with respect to talking about indicia of debt.

But like the Committee and the Plaintiffs, the trustee asked the Court to look to the parts of the debt documents that favor the trustee's arguments and ignore the other ones. And they don't have a response to it, because there is not a good response. And it's because of the nature of the debenture. It's debt until it's converted, as Your Honor rightly perceives.

And, you know, as we said in the papers on these motions, there is not any dispute that debtor loaned $2 million to Immune. It did. It accrued interest, but the debenture has

got an interest rate, it's got a maturity date. It says that we get to recover our attorney's fees, whatever that amount is ultimately determined to be. And we can fight about $14.85 million, and the make whole provisions in the rest of it, but I don't really see that there is a fight, absent subordination, that Discover is owed $2 million, plus interest, plus some fees.

So, with that, Your Honor, I'll rely on our papers. I know we've got to move along here. But I just wanted to point that out, that this is -- Your Honor rightly perceives the loan documents as a whole and understands what happened in this transaction. And I'll rely on our pleadings for the rest of it, Your Honor.

MR. RABINOWITZ: Your Honor, if I might, just briefly. Mr. Barney has raised an issue that I didn't address affirmatively, and that is the size of damages, as compared to the out of pocket advance or investment that was made here.

So I don't think there's any dispute that the investment was $2 million. With the make whole provision and legal fees -- and I'm not sure -- we don't need to address the enforceability of the make whole provision as a make whole provision, we don't need to address whether they're entitled to post-petition legal fees or whatever, or whether they've even sought them, I don't know.

But roughly $15 million, as compared to a $2 million

out-of-pocket investment, and this additional fact. And I know Mr. Barney says that the proof of claim has superceded this. And I'm not sure I fully understand the argument. I don't dispute it's bona fide, but I'm not sure I fully understand the argument.

In the immediate aftermath of the filing of this petition, Discover filed a motion for relief from the stay. And, as our local rules require, they annexed a statement of amount due to that motion, and it said $328 million is the amount due.

They have subsequently filed a proof of claim for $14,858,000, I believe, roughly. But what that demonstrates is that the expectations of Discover here, by their own position taken in this bankruptcy case, is that they are going to get an upside here that is greater than a creditor who loans money and has a reasonable expectation of permissible interest on that return.

I think that's an additional factor, so I just wanted to make that comment, Judge.

THE COURT: Well --

MR. BARNEY: Well -- go ahead, Your Honor. I'm sorry.

THE COURT: Go ahead. Go ahead, Mr. Barney.

MR. BARNEY: I would just say, Your Honor, look, we talked about this the last time, and that statement of amount

due wasn't filed by me. But all that was an attempt to do was to demonstrate, as the rules require, how the contracts work.

And we immediately clarified with a declaration that was put in for the first hearing on the stay of relief motion that the claim is for $14.85 million, based on the make wholes.

So this constant harping on that statement of amount due that was filed 15 months ago and doesn't say what the trustee and the Committee said it says, it's just -- it just -- it doesn't reflect reality, and it doesn't reflect Discover's position, and the Court should just disregard it.

THE COURT: I'll tell you what -- I'll tell you what, Mr. Barney, this is what I think it doesn't reflect. It doesn't reflect very well on Mr. Kirkland's arguments. It's definitely a factor that I have considered and that I think I raised it the first time I saw that. I said, "Look at this number. Where does this number come from?"

It was a crazy number. That's why I say I think he can lose. I didn't rule definitively on this issue. I just denied summary judgment, which --

MR. BARNEY: I understand that.

THE COURT: -- which, you know, a lot of -- but I think both sides kind of take the position that I ruled on the issue, and I haven't, because I'm not comfortable ruling on it, because there's facts in my mind that go both ways, and some more significant than others.

But on a summary judgment motion, I have to give inferences in favor of the non-moving party. And here, I mean, let me just go through it. I've got -- I'll give you my decision.

This is the motion by the Chapter 7 Trustee, Jeffrey Lester, to reconsider the Court's April 20th, 2020, order that denied Plaintiff's motion for summary judgment to subordinate the claim of Discover Growth Fund under 11 U.S.C. 510(b).

The Court has jurisdiction over these matters under 28 U.S.C. 1334(b) and standing order of reference entered by the District Court on July 10th, 1984, and amended on September 18th, 2012, the core proceeding under 167(b)(2)(a), (h), (k) and (o). Venue is proper in this court under 28 U.S.C. 1408, and the Court issues the following findings of facts and conclusions of law pursuant to 7052. To the extent any of the finding of fact might constitute conclusions of law, they are adopted as such and the reverse is true.

In this motion for reconsideration, the trustee basically adopts the debtor's statements of facts and arguments and in some respects amplifies them, and Discover really incorporated its prior statement of facts and statement of undisputed facts which, you know, many material facts were disputed. So that was one factor.

The motion for reconsideration is based on the debtor and Creditors Committee second motion for partial summary

judgment on the adversary complaint to establish that the claim held by Discover Growth Fund is a security subordinate to other claims under 510(b).

Discover's claim is undoubtedly based on October 9th, 2018, security purchase agreement senior secured convertible debenture and related documents that the parties entered into pre-petition, that is, before the debtor's (indiscernible) filing on February 17, 2019.

These facts that I'm going to indicate are mostly undisputed. The debtors were a clinical and approved stage 5 pharmaceutical company specializing in the development of novel (indiscernible) therapeutic agents in the field of inflammation, dermatology, and oncology.

Mr. Kirkland serves as the fund manager and (indiscernible) Discover Management, Inc., which was general partner of Discover Fund Management, LLLC, which is an investment (indiscernible) and managing member of the Defendant, Discover.

The debtor had a prior relationship with the Discover entity, Discover Growth Fund, a Cayman Islands liability company, for which Discover Fund Management also serves as an advisor, and to the best of my memory, the debtor, in July of 2015, under two stock purchase agreements that were purchases of preferred stock, I believe -- there might have been some convertible stock, some common stock -- and then the Cayman

entity invested another $2 million in cash in the debtor on September 6, 2016, which Mr. Kirkland described as a straight equity investment.

On July 6, 2018, the debtor, which was experiencing severe financial difficulties, sought operating capital and a means to dispose of two principal assets, the bert asset and the Ceplene asset, as they are licensed, and there was negotiations between the debtor and Discover, and they ultimately entered into a securities purchase agreement on October 9, 2018, along with a senior secured convertible debenture, which I'll call the debenture.

The agreement, the debenture, and related documents are governed by the law of the Virgin Islands. Only Immune Pharmaceuticals, Inc., which I'll call Immune, Inc., and Defendant signed the security purchase agreement and related documents.

Under those agreements, Discover agreed to purchase the debenture with a base amount of $5.5 million for $5 million with a 10 percent original issue discount by means of a $2 million cash payment and $3 million promissory note, subject t the satisfaction of certain conditions.

The parties agree that Discover funded -- never funded more than the $2 million. The agreement, among other things, granted Discover as a secured party a continuing first position lien and security interest in all right titled

interest of the company, which defined as Immune, Inc., whether now owned or hereafter -- now owned or existing or hereafter created, acquired, arising in and to all of the collateral. Collateral was defined to include all the assets of Immune, Inc., but not the Ceplene assets if the debtor had closed on a sale of other licensing for those assets. By March 31st, 2019, there was litigation on that issue in this court, and the Court approved a licensing of the Ceplene assets, effective as of March 30th, 2019, with the parties apparently continuing to dispute whether that transaction removed the Ceplene assets from the debtor's -- from Discover's collateral with various arguments being asserted by both sides.

Discover perfected its first position security interest by filing U.C.C. one financing settlements against states in Delaware and New Jersey and then by the filing of an intellectual property security agreement with the U.S. Patent and Trademark Office.

In his declaration, Mr. Kirkland states that the debtor met the conditions that triggered the debtor's obligation to pay an additional $3 million, a fact which the debtor does not really appear to dispute, although the debtor argues that the defaults were caused -- were waived or otherwise caused by Discover's alleged bad faith conduct. That's not an issue on this motion.

That, in fact, the debtor indicated in its SEC filing

of February 6, 2019, that the failure to pay debenture owed to another party when due resulted in the trigger event under the October debenture, meaning that Discover is not obligated to fund the remaining $3 million of its investment in the October debenture until the period of common stock issue of the October debentures and the October debenture warrants are registered and the first anniversary of the issuance of the October debentures and other conditions are satisfied.

I don't believe there's any dispute that those conditions were not satisfied, and without it, they couldn't convert, because there was no -- there was no stock to convert it to, which was registered.

Also relevant to the Court's decision today, and as it was before, October 10th, 2018, Form AK filed with the Securities and Exchange Commission supports Discover's secured status and first lien position. There, the debtor said the debentures are secured by a first priority security interest on all of the company's assets, other than all tangible and intangible assets associated with Ceplene, unless such assets are not disposed of by March 31st, 2019.

On February 8th, Discover sent a notice of fraud and notice of sale of collateral to the debtor. Immune filed its Chapter 11 position on February 17th.

Discover filed claim 37-1 on June 12, 2019, for $14,848,569, on the $2 million that it paid under the

agreement, and plus the 34 percent interest for five years and the $5.499 million face value of the -- of the debenture.

The trustee notes, as the Court did, that Discover stated in its motion included additional claim for damages in the amount of $324,468,730. And that was in a certification of Discover.

The adversary proceeding was filed -- this adversary proceeding was filed on July 1st, 2019, and Discover answered on August 2nd. They have filed a first motion for partial summary judgment on January 29th, 2020. Discover filed its objection. The first summary judgment motion (indiscernible) the declaration that Discover's lien was limited to $250,000 and that was subordinated. The Court denied that motion on various grounds, but including that the $250,000 limitation was a representation by the debtor that there were no other liens of $250,000 and that -- or that that's a reasonable limitation and that the factual subordination argument required the Court to look at the evidence because the words themselves, even though both parties were represented by sophisticated counsel -- Mr. Kirkland, I believe, as the attorney, has extensive experience in these matters -- but the words were less than clear and, in fact, inconsistent or contradictory.

MR. RABINOWITZ: Your Honor, excuse me. I'm having difficulty hearing you.

THE COURT: Oh, I'm sorry.

MR. RABINOWITZ: That's much better.

THE COURT: Okay. You know what, I had actually turned away to read my statement.

MR. RABINOWITZ: Yeah, I figured.

THE COURT: All right. So the securities purchase agreement provides for a grant of security interest and -- and which is the senior -- you know, the senior secured status.

On this motion, the trustee supplemented the facts in some respects with various -- various provisions of the STA, which, you know, includes securities, include the debenture, the warrant, the conversion shares, the conversion mechanism, the conversion notice that was issued that throughout Discover referred to and defined as investor 258 times.

In my mind, most of these arguments were made by the debtor and the Creditors Committee, experience of the investor, that he is sophisticated and can bear an economic risk of an investment in the securities and able to avoid a complete loss of such investment and that interest could be satisfied through the issuance of conversion shares and that on the maturity date all remaining outstanding debenture automatically converts into shares of common stock.

That the parties addressed the failure to have sufficient authorized common stock by adding a new provision to the agreement that required the debtor to use best efforts to increase the number of shares of common stock and commit full

conversion. That that never happened, and now we have the motion for reconsideration.

There is some argument over which standard applies. I'm not going to get too deep into which standard applies, because, as you -- as you, I'm sure, know by now, whatever standard I apply, I'm not reconsidering my decision, because I don't think I was brought anything that is really new. I know there's reference to a Supreme Court case that talks about plain language in a different -- you know, under a different statutory scheme where they determined that that language was plain, but I don't think I really -- I have maybe new glosses on the arguments, maybe new tenor of the arguments, but I don't think I really have any arguments that are different or new this time.

So I'm really denying the motion for the same reasons I denied it before, and that's because I find that there are -- there are disputed issues of material fact and law, really, disputed issues of law as to whether -- it's really a mixed question as to some of these things as to fact and law as to whether the note -- whether the debenture is a security as denied in 101(49) and 510(b) and intended to reach that -- intended to reach this type of transaction where there is a senior secured subordinated debenture.

Here, the Court notes that a note is also defined as a security under 101(49). A bond is also defined as a security

under 101(49). And clearly there are cases going in both directions as to whether a note is a security for purposes of 510(b).

There are factual issues as to whether this instrument is a debt or a security, as contemplated by 510(b). The first two transactions here were for straight equity or preferred stock, and it were converted to stock. The record shows, according to Mr. Kirkland, that he wasn't willing to do another equity deal and wanted to do a debt deal and that that's why he got collateral and that's why there were note terms, there were interest terms, and things like that.

Those -- those facts to me cut in favor of a construction of this as a debt security or debt as opposed to a security contemplated by 510(b).

The public reports by the debtor acknowledge the security, the issuance of the secured -- senior secured convertible debenture and the lien on all assets. As we said -- as was discussed during the oral argument, clearly a security interest was intended to be granted, and I am unaware of any case that found that there was a subordination under 510 when a security interest was granted for what was termed a debt instrument.

The -- that Discover did not convert its debenture to stock, except for a limited number of five hundred and something shares. And, also -- and, also, Discover argues that

its claim as filed is limited to default interest and early redemption or make whole kind of premium that is not based on -- not based on any equity type ticker or equity value.

Those facts and mixed questions of fact and law are sufficient for me to deny the motion for reconsideration as not presenting any new facts or law or being grounds for me to -- I just don't think I -- I just don't think I was completely wrong on that. And in this regard, although there is perhaps no case directly on point, there is cases like Mobile Tool International, Inc., 306 B.R. 778, decided after Telegroup by the Bankruptcy Court for the District of Delaware, where the Court found that the amounts owed to former shareholders who were -- who in connection with a transaction got notes for their shares, and, actually, the shares were held in escrow, and the proceeds were held in escrow, were not in security for -- for purposes of 510(b).

And that court distinguished Telegroup on the grounds of whether a claim arises from the sale of securities and is based on activities occurring after the stock sale was concluded, because some were limited to (indiscernible) that would be actual -- only at the actual sale of securities.

Telegroup said that a post-transaction activity could also form the basis of the subordination claim and that subordination under 510(b) (indiscernible) best efforts to register the stock and ensure that the stock is really

tradeable.

So if the Mobile court found that the -- that Telegroup (indiscernible) only the distinction, other courts are drawn between actually determining at the time of the stock sale and post-transaction -- and post-transaction activities, but the standard definition still only applies to claims held by shareholders and note held by note holders. That's 782. The Third Circuit did not alter the long-standing principle that Section 510(b) does not apply to instances where separate debt notes are actually issued in exchange for the stock.

And, moreover, Defendant's claims in this case do not resemble the types of transactions that 510(b) seeks to subordinate. The -- you know, getting into the reasons for 510(b), and that court in turn relied on the Montgomery -- the Montgomery Ward case, which also -- which also refused to subordinate a note claim in a case that -- from a former shareholder who filed a million dollar proof of claim based on a promissory note for the stock.

To me, both -- both Montgomery Ward and Mobile are cases that you could argue are much closer to a 510(b) case than this one is, because of the original position of the parties and shareholders.

But what I do want to emphasize here is that the Court's rationale is that the subordination of this claim as giving rise to damages under 510(b) could lead to the untenable

result that any claim produced out of the corporate bond or debenture is automatically subordinated for the claims of other unsecured creditors given their position of security. In 101(49)(A).

I do not believe Congress intended this result. That's 272 B.R. 836 at 844, 845, Bankruptcy District of Delaware, 2001.

I don't -- I agree with that. I don't think it's in every case. I think it could be the case, and it could be the case here. And there's cases, I recognize, that could argue support the opposite result, like NAL Financial Group. But in NAL, the debentures were actually converted to stock, and there was no security for the debenture.

And I acknowledge that the Court held in dicta that it didn't matter whether they were converted, but I think it matters whether they're converted, because there's different rights that accrue. Until they are converted, no one has the right to share in the equity. And that gets to all the policy reasons that are advanced for the 510(b) subordination.

You know, there is the Tristar case, the (indiscernible) case. They're not -- they are all -- they were all equity parties. They were equity. Here, this -- this Discover was not equity at the time. It was a debenture holder that had converted a small number of debentures.

And so, notwithstanding that -- the invitation to

reconsider my decision and that -- that the plain language of 101(49) and 510(b) requires me to automatically subordinate the claim of a convertible debenture holder, I -- I cannot so find, I cannot so rule. It doesn't -- frankly, it doesn't make any sense to me.

And if you apply the test, you know, that -- that has been advanced under the securities laws -- and I'm going to get to that -- the -- under the -- the motivation of the parties. This was clearly a commercial transaction which was between two sophisticated parties, one represented by Lowenstein Sandler, I believe, and the other by a sophisticated, experienced investor, who is a lawyer himself, and here the -- the motivation of the parties, you know, I could say is it looks like it's equity, or it looks like it's debt.

The things like the senior status, secured status, the prior transactions all make it look like debt. Things like very high multiples of recovery and the conversion features and the other arguments made by debtor and creditor -- and trustee's counsel, you know, all cut in favor of a finding the other way.

The plan of distribution -- so that factor is mutual. Plan of distribution, the trustee argues that it's an instrument where there's a common trading for speculation and investment. But this was a -- this was a two-party transaction. It wasn't sold to anybody else. The debenture

was purchased by Discover, and it was a transaction between them.

Citing The Equitable Life Assurance Society of the United States v. Arthur Andersen, 655 F.Supp. 1225 at 1243. Note evidencing an isolated transaction and not designed for public trading held not to be a security. So that factor, I think, cuts against a finding of a security.

Reasonable expectations of the investing public. Here, the public expectations, to the extent there were any, were that there was a senior secured convertible debenture and that -- and that the investing public, if anybody made an investment in this debtor, they knew that they had to look at whether there was a -- if somebody wanted to make a secured loan, in particular, they had to look to see whether there was a secured party ahead of them, and they would have found, according to the records, that there were. So that cuts in favor of finding a security -- a debt instrument.

And that the Federal Securities Law apply and the alternative regulatory scheme, but this is -- the parties -- the parties took pains -- those investment representations were so that they wouldn't have to comply with the securities laws and so that they wouldn't -- they wouldn't have to do all the things that they needed to do in just in connection with the original issuance of the debenture, other than when the stock needed to be converted, they issued enough and they registered

enough.

But those facts, they cut in favor of -- while that -- the regulatory scheme is neutral or maybe slightly tipping in favor of a debt, I just don't know enough yet on that, but I think it could go either way on all these issues.

And, you know, the fact that they invested -- Discover only invested $2 million and is now seeking $15 million or $324 million, or whatever the number is, it's multiples of what the transaction -- the initial advance was. And that's a factor that cuts in favor of finding that it's a security. So those are factors that cut in favor of finding security.

And even those articles and those -- the professors and Telegroup, as I said, they didn't reach -- they didn't reach this far. None of that went this far. And the Third Circuit in Telegroup had a lot of trouble interpreting 510(b). So I don't think it's so clear and unambiguous as it's been made out to be.

So I am denying the motion for reconsideration. And I just need a simple order on that for the reasons set forth on the record. And, you know, if you want to make a motion under 8006, you can certainly make it, Mr. Rabinowitz, but I just can't deal with that today.

MR. RABINOWITZ: Understood, Your Honor. I will submit the order.

THE COURT: Okay. All right. And now we go to the stay relief.

MR. RABINOWITZ: Yes.

THE COURT: And, you know, on this one, I kind of think I dealt with this, too, but let's -- we can proceed on that.

MR. RABINOWITZ: Judge, I think you dealt with it as well in the -- in the 4/2 transcript, Your Honor at the end essentially said there is -- the collateral consists of cash that's being held by debtor's counsel and there's no decline associated with that cash, and they are adequately protected.

But I -- this --

THE COURT: Well, maybe -- I'm saying this, and I'm just making a joke, because we've been on for so long, maybe Mr. Barney is asking for reconsideration of that.

MR. BARNEY: Well, Your Honor, I appreciate Mr. Rabinowitz arguing the counter-position on my motion, but things have changed, Your Honor.

Discover's minimum secured claim continues to accrue and now exceeds $3.1 million. I know the Court hasn't awarded it fees as of yet, but that number continues to grow. The only collateral is -- that we have thus far is the $2.93 million and whatever limited amount of money that the other assets that fall into the collateral pool might generate at some point, which so far has been zero.

And we've demonstrated, as we did when the motion was argued the last time, that the -- that the value of the collateral has declined from the petition date. The trustee's efforts to minimize the value of the collateral as only being $1.5 million as of the petition date just begs credulity. And the -- the time -- like the motion to convert that Your Honor granted two months ago, the motion for stay relief has grown more appropriate with the passage of time and the continued increase in Discover's claim and the lack of -- the lack of the estate to provide adequate protection.

As I said earlier, we can fight -- there is a lot to fight about there, but one thing that nobody disputes is that Discover advanced $2 million and that the debenture says that we get interest and fees.

And even if you only calculate interest and fees at minimum amounts, it still exceeds the value of the collateral that's available to provide Discover with adequate protection.

THE COURT: But how do you square that with my decision just now that -- and before where I just said I didn't rule that -- that it couldn't be subordinated. Maybe it all gets subordinated. Then what?

MR. BARNEY: Well, Your Honor, I -- well, if it does get -- I don't see a conceivable outcome here where the minimum amount of this claim gets subordinated, because the money was advanced, and it was never converted. And, you know, it's not

the -- the trustee's suggestion that he's going to the Third Circuit on that issue notwithstanding, I think any other court is going to -- and I think Your Honor or the District Court, if their reference gets withdrawn, is going to come to that conclusion.

Discover has been -- Discover has been dragged through this case as, you know, the bad guy, and nobody -- and none of my adversaries have ever acknowledged that Discover put the last money in in a positive light, anyway, and Discover is entitled to get its money back.

THE COURT: Well, maybe. But it's maybe. I'm saying these are real claims. I said this to you the other time, and I think you acknowledged it, Mr. Barney. In fact, my memory is I noted that Mr. Barney didn't move for summary judgment because it wouldn't be likely to be granted, and it wouldn't be likely to be granted the other way, either.

Discover could lose.

MR. BARNEY: I understand that, Your Honor.

THE COURT: So why aren't they adequately protected by $2.9 million sitting in escrow in somebody's account when they entire amount is disputed and there is real bona fide claims for it, number one.

Number two is, and this is not a reflection on you in any way, but the way this case started, there was at least $100,000 of fees that accrued during the first week opposing

extension of time to file schedules and filing a -- I have it here, I pulled it out. It's like -- it's hundreds of pages. Yeah. It's like 300 pages, the motion that they filed right away to -- to get relief from stay.

And then it turns out that -- it turns out that Discover didn't get -- didn't get Limited, which had the license on the -- on the key bert assets, and that was in Limited. And it turned out that there was an issue as to the Ceplene.

And so there's all kinds of issues here as to what amount they may or may not be entitled to at the end of the day.

MR. BARNEY: Well, I guess, Your Honor --

THE COURT: So I'm just not sure why they're not adequately protected right now by the amount of money sitting in the account.

MR. BARNEY: Your Honor, if I win, and I've got a claim for, you know, $3.2 million or some number, I'm certainly not adequately protected.

So, you know, if you grant stay relief, presumably Discover goes away. And if we get paid --

THE COURT: I'm glad you said presumably, because I don't know if Discover is ever going away. They've got suits going on in District Court, and there's all kinds of things going on. I don't know.

MR. BARNEY: Well, Your Honor, it's just -- as I said earlier, it's our position that the time has come in this case for Discover to have resort to its collateral, and I think I know where you're going. I've been asked to let you know that Discover is going to take an appeal of the denial of this motion, if that's where this ends up.

THE COURT: Well, that's -- you know what, it looks like there's going to be a couple of appeals or attempted appeals, and that's fine. That's totally fine. That's what's part of the thing. You know, one person -- usually when I make a decision, one person is happy and one person is not. So what am I going to do?

MR. RABINOWITZ: Judge, if I might -- excuse me -- if I might just be heard briefly. The three of us have been doing this for a long time, and we all understand that parties' pre-bankruptcy rights get adjusted in some way under the Bankruptcy Code. Congress has set a bunch of rules, and we all try to address those rules as best we can.

So I just want to say a couple of things that I just don't understand. If Discover's out of pocket investment is $2 million, and if the collateral, the known collateral -- and Discover has taken the position everything else is worthless -- is $2,930,000, my understanding of Section 506(b) is the max claim -- secured claim that Discover could ever have is $2,930,000. It can't have a $3.1 million claim, and it can't

continue to grow. It stops. You can only get -- 502(b)(2) says you can't get unmatured interest post-petition, and 506(b) says a secured creditor can get -- can get it to the extent of its over security fees and interest.

And the failure to get that stuff, the failure is not a lack of adequate protection. That's what the Supreme Court told us in Timbers. So there is no continuing harm by virtue of the increase in the size of Discover's secured debt that forms a basis for claiming lack of adequate protection.

So the only issue is -- the only issue --

THE COURT: Well, wouldn't they get -- wouldn't they have an unsecured claim for the balance to the extent that they --

MR. RABINOWITZ: Absolutely. But that's not lack of adequate protection.

THE COURT: No, but that means that they still have a claim.

MR. RABINOWITZ: I'm not in any way suggesting -- well, let me take a step back. They have an unsecured claim for the full amount of whatever the Court determines they are owed.

What they can't get as part of their unsecured claim is interest in attorney's fees that they were prohibited from accruing under Section 506(b). So -- but that's a different issue.

All I'm addressing is the secured claim, because I think, if I understand the argument correctly -- and many times I don't -- is that the secured claim continues to grow and, hence, that's a lack of adequate protection. And all I'm suggesting is the secured claim -- not the -- and even the overall claim -- but the secured claim cannot continue to grow. It's limited to the value of the collateral, and essentially what we're fighting about at this point in time is $2,930,000. So the question --

THE COURT: But, I mean, he's arguing that he's worse off because it's continuing to accrue, and then he's not going to be able to recover in full from his collateral, where he would have been before. That's the argument, as I understand it.

MR. RABINOWITZ: Meaning -- let me see if I understand the argument. It's the -- first of all, Timbers said that's not -- that's not so. Timbers said that you cannot argue lack of adequate protection by the accrual of post-petition interest beyond what the value of your secured claim is.

You can make that argument presumably to the extent there's over security, but there is no over security here. So I think Timbers has rejected that argument.

And so all we're focusing on is adequate protection. And, yes, there are cases that talk about -- under 361,

periodic payments, replacement lien, equity cushion, but the cases we have cited -- and I don't think any courts have rejected them -- is what is to be protected is the value of your collateral and lien position.

And that's simply a comparison, not from the petition date, but from the date you file the motion to the date of the hearing, has there been a decline in that collateral. And there -- the only thing we're talking about at this point in time, essentially, is $2,930,000, and by definition, it can't decline in value over time.

So, for that reason alone, there's adequate protection. We've got additional arguments as to what the collateral was worth in the early stages of the case and what it's worth today. I think as a result of the bert sale, there was an improvement from what the initial offer was to what it ultimately sold for. That's not a decline. That's an increase, which is the opposite of a decline, so that's not lack of adequate protection.

There's been no determination as to who owns the proceeds in any event. Even though there has been an administrative allocation of $3 million to Israel and $3 million to the United States, there has been no determination of a court of competent jurisdiction. That's, in fact, what each proceeding is entitled to.

And to the extent that it's ultimately determined --

I don't think this will happen for practical reasons, I'm not suggesting it -- but if it's ultimately determined that the Israeli Ltd. proceeding has all of the asset value and none of it is in any of the debtors before this court, that their collateral position can't decline, because it would have started at zero and it remains at zero.

There's basically been no evidence of decline in value, either as a matter of law or a matter of fact as to what the collateral was worth at some earlier point in time and what the collateral is worth today.

And that's the test here, not accrual of interest, not accrual of attorney's fees, but simply decline in value of that collateral.

The second point that Your Honor made is that one of the pre-conditions for a determination for relief from the stay is the validity of the secured creditor's lien. And we do have the pending adversary proceeding, which has yet to be resolved, and may take some time to resolve. And, putting aside all the other -- I know that Mr. Barney has made a point, and I'm not in any way minimizing the point, has made a point that there were aspersions cast here by the debtors and the Committee, okay.

I'm not -- I'm not here to address them in this -- in this proceeding right now. But the fact of the matter is that I believe, especially as evidenced by Your Honor's opinion

right now, that there is a good faith basis under 510(b) alone to subordinate their lien in claim. And if that is successful, there is no need to prevail on any of the other 13 counts of the complaint.

It gets the same relief that many of the other counts under alternate theories would have resulted in. So Mr. Barney can have his opinions as to the merits, and we don't need to argue what the other counts -- the validity of the other counts. The reality is that if the trustee prevails under 510(b), their lien is subordinate and they wouldn't be entitled to relief from the stay.

Another smaller issue has just recently arisen, and by virtue of give and take between Mr. Barney and I, in an effort to move this along, it's become apparent to the trustee that there is a dispute between Discover and the debtor with regard to the scope of the lien on at least one other category of assets, and that's the estate's D and O claims.

And yesterday we filed an adversary proceeding seeking a determination that their lien doesn't cover that, so that if Your Honor were to grant relief from stay today, I would make an argument that there is still an outstanding issue as to the scope of that lien and whether it covers the estate's D and O claims. I think it doesn't under 9108(e), because it requires specificity of description of collateral, it's a commercial tort claim, and there is -- at best, the only thing

in the security agreement is general and tangible.

So there are disputes with regard to the scope and the validity of Discover's lien which make it inappropriate at this time to grant relief from the stay, and there has been no demonstration of diminution of value of collateral. In fact, it's at least stable. It could have gone up. And the accrual of post-petition interest and fees is not in accordance with Timbers, a basis to claim lack of adequate protection.

So, for all those reasons, consistent with Your Honor's prior ruling, I think on April 2, the trustee submits that Discover is adequately protected and the 362(d) motion should be denied.

THE COURT: Okay. Mr. Barney, do you want to respond?

MR. BARNEY: Your Honor, yeah, very briefly.

With respect to the issue diminution of value, it's clear, based on the testimony of the debtor's principals and professionals -- or not professionals, but their principals, that the assets at the petition date were worth tens of millions of dollars and that as a result of the pendency of these cases, the assets net to the debtor, to the American -- to the U.S. debtor, are $3 million.

So, you know, Mr. Rabinowitz makes some clever arguments about how you can -- you can recalculate the math, but from a broad strokes perspective, the value of the

collateral is diminished, and for all the reasons that we've said in our various pleadings on this motion, including the passage of time.

And I think that's proven out by the fact that Mr. Rabinowitz is now talking to potential buyers for the rest of Immune Limited's -- I mean, Immune, Inc.'s assets for, you know, a relative small, six-figure number.

I'm aware of what 506(b) says, and Your Honor I think correctly interpreted our argument. The argument is not that we're entitled to collect on a secured basis more than what our collateral is worth, but rather, that by denying stay relief, we continue to accrue fees that, at least under the documents, are entitled to secured status, that wouldn't accrue otherwise, because we would be paid off.

And I think that's all I have to say in response to what Mr. Rabinowitz said, Your Honor.

THE COURT: All right. This matter is before the Court on the motion of Discover Growth Fund for relief from stay so as to seek to obtain the entire $2.9 million that is being held in escrow by debtor's counsel in connection with the sale of the bert assets.

I'm going to deny the motion for relief from stay on several grounds, and many of them were touched upon by Mr. Rabinowitz. You know, whether it's for cause or whether it's for lack of equity and not necessary for reorganization, well,

you know, there is no reorganization here, so that doesn't apply.

But whether there is -- whether there is equity in this collateral presupposes where that Discover has a valid and existing lien on all of those proceeds. And for many reasons, I am not prepared to find that.

I am not prepared to find that because, number one, there is a viable 510(b), a subordination claim, and there's viable claims -- there's other claims that haven't been subject to summary judgment motions that are pending and that are on -- you know, on track to be tried at some point. I don't know exactly when but, hopefully, you will be doing trials again soon, and if the -- if the 510(b) argument is successful, and it's being argued to me very strongly by two sets of competent counsel that -- that as a matter of law it needs to be, then Discover has no claim to those proceeds at all, because it's subordinated and the lien, it goes over to the estate. That's number one.

Number two is that the whole -- the amount of the claim I'm just not sure about. You know, I know that Discover thinks it's been dragged through the coals or raked through the coals, but the debtor -- the pressure on the debtor has been relentless from the very get-go, as I indicated, including an objection to a little bit more time to file schedules, the -- and a motion for relief from stay right out of the box when it

turns out that Discover didn't get Limited, the owner of the license, to sign off on the pledge of the collateral. That's a big problem to me.

And related to that is that I don't know what the allocation is between Limited and Inc. And the Israeli people say it should be all in Limited. But it's very, very fuzzy, and it's going to require, I think, some detailed testimony, maybe experts and fact finding on all these various issues as to the nature and extent of the lien.

I think there's a very good claim that -- there is certainly a bona fide claim that the Discover lien doesn't extend to the Ceplene assets, because under an circumstance it would arise pre-petition -- it would arise post-petition, and there was the licensing anyway. So that is -- that's another r I am -- I've just got to -- hold on one second.

(Pause)

THE COURT: That's another reason I am denying the stay relief, because I don't know what the -- what the extent of Discover's collateral is at this point.

And I don't know that the amount of the fees is reasonable at all. I just don't know at this point. My sense is that a lot of the fees wouldn't be allowable anyway.

When -- there is also the issue that we have from the get-go here about the -- about the other various claims that are being made against Discover that are the subject of the

adversary proceeding and -- and whether, you know, Discover has other assets that are subject to its lien as well, including the D and O policy, as was mentioned by Mr. Rabinowitz.

So then I have the $2.9 million in escrow that's not going anywhere until there is a final resolution. And so, in all those respects, I think that that I'm going to -- I'm going to go with an argument that was advanced by the Creditors Committee in terms of the -- in terms of the granting stay relief when there is an adversary proceeding pending that challenges the nature and extent and validity of the lien.

And the Court should determine whether there is a -- the party opposing the motion has a colorable claim pending. I already did. That's In Re Wile, 310 B.R. 514 at 519, Bankruptcy Court of Eastern District of Pennsylvania, and In Re Robbins, 310 B.R. 626 at 630, Ninth Circuit BAP 2004, granting or denying stay relief while an adversary proceeding is pending is within the sound discretion of the bankruptcy court. In its discretion, the Court may consider evidence that the movant as a secured party is potentially vulnerable.

I have determined that. That's the In Re Montgomery case, 262 B.R. 772 at 775. And there, the Montgomery case stated that where there is evidence that affects the validity of the creditor's claim, the stay relief could be denied or potentially a more congruent alternative would be a conditional denial of relief from stay under the requirement that the

respondent commence and prosecute a separate litigation.

Here, that's already -- that's already -- that litigation has already been commenced. And just success on the 510(b) would be enough to deny the claim in its entirety.

So -- then there's also the Poughkeepsie Hotel Associates case that allows you to consider defenses like that in a relief from stay motion. And it directly involves whether the debtor -- you know, whether Discover has rights and the extent of those rights in the collateral that's there.

And I think that the assets that are there provide very, very good adequate protection to Discover because I think the sale produced what it could in the Bankruptcy Court, the best offer that was made, and resulted in arguably an increase in the proceeds available to this estate, certainly than if the relief from stay had been granted at the early stage and Discover was allowed to foreclose on the collateral in the Virgin Islands, where there was not going to be any real public sale anyway, that the argument is that it's -- that the position has approved -- has improved against, you know, as against Discover, even though it fought it every step of the way.

And, like I said, there is substance to the debtor, the estate's claims, and I am going to deny -- I'm going to deny the stay relief motion and the motion is denied pending the outcome of the adversary proceeding.

And in closing, all I'll say is it was my fervent hope that when the trustee got in this case some of the vitriol and histrionics, as it's been described, between the parties would subside, and they would be able to come to a rational business solution of this.

I can think of one. And it's so simple, it's -- but I don't know, and I don't know what -- I don't know what the discussions are. And I know you were talking to Judge Kaplan, but apparently those were not successful.

But if ever there were a case -- we've got motions to withdraw the reference, we've got maybe one or two appeals, we've got trials. This is the time. Get this case resolved so that everybody gets something and nobody walks away with nothing and the legal fees don't eat up the whole case. That's my strong encouragement. Okay.

MR. BARNEY: We appreciate that, Your Honor.

MR. RABINOWITZ: We appreciate it, Judge. I think both of us share that view, and it's just a question of how we're going to get from here to there, and we haven't been able to do it yet, so...

THE COURT: They're going to allow trials in Newark soon. So, you know, if we have to get to a trial, we'll get to a trial.

MR. RABINOWITZ: All right. Judge, thank you very much for your time today, and Your Honor has devoted several

hours to these issues, and I think we both appreciate it very much.

THE COURT: With all candor, Mr. Rabinowitz, it's more than several at this point. But you know what else? We have been talking so long that the recording is running out, so we have to go.

MR. RABINOWITZ: All right. Thank you, Judge.

MR. BARNEY: Thanks very much, Your Honor.

MR. RABINOWITZ: Take it easy. Stay safe and healthy.

THE COURT: Have a good one. Thank you.

MR. RABINOWITZ: All right. Thanks. Bye.

MR. BARNEY: Bye.

THE COURT: Bye.

* * * * *

C E R T I F I C A T I O N

I, LORI KNOLLMEYER, court-approved transcriber, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter, and to the best of my ability.

/s/ Lori Knollmeyer

LORI KNOLLMEYER

J&J COURT TRANSCRIBERS, INC. DATE: July 6, 2020

EXHIBIT B

UNITED STATES BANKRUPTCY COURT DISTRICT OF NEW JERSEY
Caption in Compliance with D.N.J. LBR 9004-1(b) **RABINOWITZ, LUBETKIN & TULLY, LLC** 293 Eisenhower Parkway, Suite 100 Livingston, New Jersey NJ 07039 (973) 597-9100 Jonathan I. Rabinowitz John J. Harmon *Counsel for Jeffrey A. Lester, Chapter 7 Trustee*
In re: IMMUNE PHARMACEUTICALS, INC., et al., Debtors.
IMMUNE PHARMACEUTICALS, INC.; IMMUNE PHARMACEUTICALS, LTD.; CYTOVIA, INC.; IMMUNE ONCOLOGY PHARMACEUTICALS, INC.; MAXIM PHARMACEUTICALS, INC.; IMMUNE PHARMACEUTICALS USA CORP.; and THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF IMMUNE PHARMACEUTICALS, INC., et al., Plaintiffs, v. DISCOVER GROWTH FUND, LLC, Defendant.

Order Filed on July 10, 2020
by Clerk
U.S. Bankruptcy Court
District of New Jersey

Case No. 19-13273 (VFP)

Chapter 7
(Jointly Administered

Hon. Vincent F. Papalia

Adv. Proc. No.: 19-02033

Hearing Date and Time:
June 23, 2020 at 11:00 a.m.

ORDER DENYING TRUSTEE'S MOTION PURSUANT TO F.R.B.P. 9023 FOR RECONSIDERATION OF ORDER DENYING PARTIAL SUMMARY JUDGMENT UNDER 11 U.S.C. § 510(b)

the Relief set forth on the following page, numbered two (2), is hereby **ORDERED**.

DATED July 10, 2020

Honorable Vincent F. Papalia
United States Bankruptcy Judge

THIS MATTER having been opened to the Court by Jeffrey A. Lester, Chapter 7 Trustee (the "Trustee") for Immune Pharmaceuticals, Inc. ("Immune Inc."), Immune Pharmaceuticals, Ltd. ("Immune Ltd."), Cytovia, Inc. ("Cytovia"), Immune Oncology Pharmaceuticals, Inc. ("Oncology"), Maxim Pharmaceuticals, Inc. ("Maxim"), and Immune Pharmaceuticals USA Corp. ("USA" and, collectively with the foregoing entities, the "Debtors"), by and through the Trustee's duly retained counsel, Rabinowitz, Lubetkin & Tully, LLC, upon the filing of a motion for reconsideration (the "Motion") pursuant to Federal Rule of Bankruptcy Procedure 9023 of the Court's Order entered on April 20, 2020 denying the second motion for partial summary judgment (the "Partial Summary Judgment Motion") filed by the Debtor and the Official Committee of Unsecured Creditors of the Debtor (the "Committee") against Discover Growth Fund, LLC ("Discover") seeking summary judgment on Count Eight of the Complaint in the above-captioned adversary proceeding (the "Adversary Proceeding"); and good and sufficient notice of the Motion having been provided; and the Court having considered the Motion, the opposition thereto and the arguments of counsel; and for the reasons set forth on the record on June 23, 2020 and in the Court's denial of the Partial Summary Judgment Motion;

IT IS HEREBY ORDERED that the Trustee's Motion be and is hereby denied; and it is further

ORDERED that the entry of this Order is without prejudice to any and all further rights the Trustee may have regarding the Adversary Proceeding and the Partial Summary Judgment Motion including, without limitation, any rights of appeal or to seek leave to appeal, to seek a stay pending appeal and to seek certification of a direct appeal to the Court of Appeals pursuant to Bankruptcy Rule 8006.